SUPREME COURT, U.S.

No. 1100

Office-Supreme Court, U.S.
FILED
MAR 7 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

AKSHUN MANUFACTURING COMPANY AND V & S ICE MACHINE COMPANY, INC.,
Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,
Respondent,

and

NORTH STAR ICE EQUIPMENT COMPANY; JAMES C. WOOD; LYLE BRANCHFLOWER; ALLEN J. TRUER; AND LOREN HOVLAND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANNA R. LAVIN
53 West Jackson Blvd.
Chicago, Illinois 60603

EDWARD J. CALIHAN, JR.
105 West Adams Street
Chicago, Illinois 60603

PETER R. SCALISE
134 North LaSalle Street
Chicago, Illinois 60601
Attorneys For Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Judgment and Orders of the Court Below 2

Statement of Jurisdiction 3

Questions Presented 4

Statement of the Case 5

Reasons for Granting the Writ 13

Conclusion 22

Appendix 1a-2a

Order dated December 7, 1965, denying Motion of Petitioners for Leave to File a Complaint in the United States District Court for the Northern District of Illinois, Eastern Division 2a

Order dated February 2, 1966, dismissing appeal in Cause No. 15461 ..... 2a

CASES CITED.

Akshun Manufacturing Company and V & S Ice Machine Co. v. Carrier Corporation, 57 C 1065 15

Assman v. Fleming, 8 Cir., 159 F.2d 332 20

Brady v. Beams, 10 Cir., 132 F.2d 985, 986-987 17

Hazel Atlas Glass Co. v. Hartford Empire Co., 332 U.S. 238 ..... 4, 13, 18, 19

Kingsbury v. Buckner, 134 U.S. 650, 670 17

Nelson v. Meehan, 9 Cir., 155 F. 1 17

North Star Ice Equipment Co. v. Akshun Manufacturing Company, et al, No. 57 C 1223 (301 F.2d 882) 2, 6

North Star Ice Equipment Company v. Akshun Manufacturing Company, 193 F.Supp. 844 5

PAGE

Pacific Railroad of Missouri v. Missouri Pacific Railroad Co., 111 U.S. 505 17

Root Refining Co. v. Universal Oil Products, 3 Cir., 169 F.2d 514, 521, 522 ..... 19, 20

Walker Process Equipment Inc. v. Food Machinery and Chemical Corp., 865 S. Ct. 347 4

RULES.

Rule 23(5) of the Rules of the Supreme Court 3

Rule 60(b) of the Federal Rules of Civil Procedure 2, 4, 7, 10, 11, 15, 16, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No.

AKSHUN MANUFACTURING COMPANY AND V & S ICE MACHINE COMPANY, INC.,

Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Respondent,

and

NORTH STAR ICE EQUIPMENT COMPANY; JAMES C. WOOD; LYLE BRANCHFLOWER; ALLEN J. TRUER; AND LOREN HOVLAND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Akshun Manufacturing Company and V & S Ice Machine Company, Inc., pray that a Writ of Certiorari be issued to review the orders of the United States Court of Appeals for the Seventh Circuit in the above cases.

JUDGMENT AND ORDERS OF THE COURT BELOW

This Petition arises out of a case filed in the United States District Court for the Northern District of Illinois entitled *North Star Ice Equipment Company* v. *Akshun Manufacturing Company, et al.*, No. 57 C 1223, reviewed in the United States Court of Appeals for the Seventh Circuit under Number 301 F. 2d 882. The action involved Lees' Patent Number 2,659,212. A motion to vacate the affirmance at 301 F. 2d 882 on the grounds of fraud was brought under Rule 60 (b) of the Federal Rules of Civil Procedure, but denied as *untimely* filed, as was the Petition for Rehearing so denied on the same grounds. Certiorari was denied March 23, 1964 by this Court under Number 805, Supreme Court of the United States. (376 U.S. 952).

A complaint was filed in the United States District Court for the Northern District of Illinois, Eastern Division on or about August 27, 1965, against North Star Ice Equipment Company, Inc., its attorney in that suit, its principal owner, and two of its employees on the ground that they made false representations and had given false testimony in that action upon which false testimony and false representations the Court of Appeals relied in reversing the fact findings of the District Court, and in reversing the judgment of patent infringement.

On September 30, 1965, said District Court, noting that the Court of Appeals for the Seventh Circuit had refused to entertain the Motion made under Rule 60(b) because it was untimely filed, made a finding that it lacked jurisdiction to entertain the independent action without leave of the United States Court of Appeals for the Seventh Circuit.

These cases sought here to be reviewed present related questions and are thus combined in this Petition pursuant to Rule 23(5) of this Court.

A motion was filed in the United States Court of Appeals for the Seventh Circuit in the original action, No. 13443 (301 F. 2d 882) asking leave to file said independent action grounded on fraud in the United States District Court for the Northern District of Illinois. On December 7, 1965, that motion was denied on the asserted ground that it attempted to raise once more issues that had theretofore been *raised and passed upon* by said United States Court of Appeals for the Seventh Circuit.

An appeal was taken from the dismissal of the said independent action to the United States Court of Appeals and, on motion of the respondents herein on February 2, 1966 the appeal was dismissed on the stated ground that the issues raised in the appeal had already been decided by the United States Court of Appeals for the Seventh Circuit.

The Orders of December 7, 1965, and of February 2, 1966, appear in the printed Appendix filed with, and certified by the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit denying leave to file the independent action in the United States District Court for the Northern District of Illinois was filed on December 7, 1965. The Order dismissing the appeal from the dismissal of the independent action in the United States District Court for the Northern District of Illinois against North Star Ice Equipment Company, its principal owner, its attorney, and its employees was filed on February 2, 1966. This Petition

is filed within 90 days of the first order sought to be reviewed. The jurisdiction of this Court is invoked under the provisions of 82 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where it is charged that a Court of Appeals decision is the result of wilful and knowing fraud, misrepresentation and false evidence and a Motion to vacate the decision filed under Rule 60(b) is denied without hearing of the issues on the ground of untimeliness, does that foreclose a new and independent action based on the fraud in view of this Court's decision in *Walker Process Equipment Inc.* v. *Food Machinery and Chemical Corp.*, 86 S. Ct. 347?

2. Where fraud on the Court of Appeals is discovered in a patent case, will the provisions of Rule 60(b) of the Federal Rules of Civil Procedure regarding time limitations effectively operate to permit the perpetrators of the fraud to enjoy the fruits of a patent which, as this Court has said in *Walker Process Equipment* v. *Food Machine and Chemical Corp.*, (86 S. Ct. 347), is affected with a public interest, by the simple expedient of claiming that the relief from the fraud was not sought within a year, notwithstanding the provisions of said Rule 60(b) that the time limitations will not foreclose an independent action based on the fraud? *Hazel Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238.

3. Will the dignity of the United States Courts tolerate a charge upon the Courts of the United States of fraud in obtaining the fruits of a patent without hearing on the validity of the claims of fraud, misrepresentation, and false evidence?

4. When an appeal is taken and its justiciable nature is based upon the authority of this Court and other Courts

of Appeals, can such an appeal be summarily dismissed on motion of the appellee without an opportunity to the appellant to present the merits of their cause?

STATEMENT OF THE CASE

On September 8, 1950, application for Patent 2,659,212, naming Gerald M. Lees as inventor was filed in the Patent Office. The application disclosed and claimed a particular knife for removing a thin sheet of ice in flakes from the freezing surface on the inside of an upright drum-type ice making machine. The plurality of these knives are carried on an arm revolving slowly around the freezing surface and has a horizontal leading portion with an edge adapted to score and form parallel space grooves in the ice. A trailing edge tilted downwardly at an angle to the direction of movement forces the scored ice downwardly breaking the bond between the ice and the freezing surface and completing the ice removal process.

On February 11, 1953, certain combination claims were granted a patent, and those combination claims describe the machines for making flaked ice a general term and describe the blades with particular clarity stating again their two-part description and function. Prior to having attained his patent, Lees was engaged by contract to build a working ice machine for North Star's predecessor, The Lyle Branchflower Company. That contractural arrangement did not contemplate the alienation by Lees of any improvements developed by him for any but the single ice machine which he was engaged to construct for use by Branchflower.

The United States District Court for the Northern District of Illinois in *North Star Ice Equipment Co.* v. *Akshun Mfg. Co.*, 193 F. Supp. 844 found the evidence to clearly

show that Branchflower intended to produce and sell ice machines in quantity at the time Lees was engaged to construct the machine, but it was not until Lees had constructed the machine that Branchflower disclosed his intention to manufacture and market the machine as his own creation. Terminating Lees engagement, the Branchflower organization launched its ice making machine business.

On February 8, 1951, Lyle Branchflower applied for a patent on a flake ice-making machine, claiming himself as inventor, but the patent application was refused on the ground that he was not the inventor of the material he claimed. The Petitioners herein, Akshun Mfg. Co. and V & S Ice Machine Co. are assignee and successor assignee of the Lees Patent No. 2,659,212, the invention of the present controversy.

On January 18, 1957, the respondent, North Star Ice Equipment Co., filed a declaratory judgment action against Akshun Manufacturing Company, and another, for a declaration of invalidity in non-infringement of Akshun's Lees' patent 2,659,212, including claims directed to an ice removal blade or tool and a method of making ice. On September 9, 1957, one of the Petitioners, Akshun, filed its Answer in the nature of a counter-complaint asserting that said patent and another were valid and infringed by North Star.

After trial the United States District Court for the Northern District of Illinois found that the blades used by North Star were the equivalent of Akshun's patented blades, and infringed claims 1 and 2 of the said patent and were the equivalents of patented combination claims 5, 6, 7, and 8 of that patent, and also Method claims 3 and 4.

The United States Court of Appeals for the Seventh Circuit, however, on appeal, (301 F. 2d 882) reversed the

lower court's decision that the patent had been infringed on the ground that the evidence on the question of infringement was almost entirely documentary or in the form of physical exhibits and that the blade presented to the Court as being used by North Star, Exhibit 21, did not infringe the Lees' Patent.

The Respondent, North Star and the individual respondents all represented to the Court that Exhibit 21 was the *only* physical structure used in the North Star flake ice making machines.

On the petition of the petitioner, Akshun Manufacturing Company, to the United States Court of Appeals for the Seventh Circuit to vacate its judgment because of fraud, it was represented that subsequent to trial said petitioners, its officers, and counsel discovered thirty North Star machines sold and installed prior to the trial on *none* of which was Exhibit 21 illustrative, but on the contrary, all had the features incorporated in Lees' Patent No. 2,659,-212. In the meantime the decision of the United States Court of Appeals was being sought to be reviewed on Writ of Certiorari before this Court. Filed on August 16, 1962, the Petition was denied by this Court on November 5, 1962. On July 30, 1963, the United States Court of Appeals entered an Order denying the request on the petition to vacate the judgment under Rule 60(b), explaining that the initial petition for relief was not *timely* as having been filed more than one year after the date of the original petition. To the petition for relief under Rule 60(b) North Star filed an answer supported by numerous affidavits and raised issues of timeliness, prior knowledge, but admitted that Exhibit 21 was only "substantially identical" to other blades it manufactured; that the physical appearance changed from time to time, and that the photographs (submitted by the Petitioner of blades actually in use) represented worn and mutilated blades, thus tacitly con-

ceding that through normal wear identity with Lees' Patent Number 2,659,212 resulted. To this variance from the trial claim and the appeal claim that Exhibit 21 was the only blade employed by North Star Ice Equipment Company, Akshun, on June 13, 1963, asked leave to file an answer to North Star's Answer. That Motion was denied on July 30, 1963.

The Court of Appeals for the Seventh Circuit in refusing to entertain the motion made under Rule 60(b) stated:

> "The petition of Akshun was not timely as that it was filed more than one year after the date of the judgment of this Court."

Since the Court of Appeals for the Seventh Circuit denied Akshun's motion for leave to file a response to North Star's Answer, the contentions of North Star, never having been put to issue, could not have been determined by the Court of Appeals.

This was made abundantly clear in a petition for rehearing when petitioners claimed that in returning the documentary exhibits upon which the 7th Circuit had reversed, respondent switched the significant blade drawing to a different and more favorable one to resist the 60(b) petition.

This notwithstanding, when a Petition for Certiorari was filed to this Court, North Star and their attorneys made answer to the Petition in what these petitioners contend to be false and fraudulent in the following particulars:

1. Represented that the Exhibit 21 was in fact the true North Star blade, when in fact both the attorneys and the North Star witnesses knew that the exact physical structure alleged as never having been used in North Star ma-

chines was in common use in their machines as manufactured by North Star.

2. Represented to the Supreme Court that the Exhibit 21 and North Star blades were in fact the same physical structure as a certain prior art patent (Taylor patent) when in fact both knew that neither the Exhibit 21 nor any of the actual North Star blades were of such a physical structure.

3. Represented to the Supreme Court that the Seventh Circuit Court of Appeals reversed the District Court "as a matter of law" on the basis of an alleged file wrapper estoppel, when in fact the attorneys knew that the file wrapper estoppel was false and did not in fact apply to the Exhibit 21 nor the actual North Star Blades. The Seventh Circuit actually re-determined the functional identity of the Exhibit 21 as a matter of fact and reversed on this point, and not upon "a matter of law."

This Court denied Certiorari. Subsequently it was found that North Star was selling ice removal blades whose front part was machined "sloping outwardly toward the ice drum wall — —" in the exact manner as claimed never to have been used in the North Star machines. Further, the attorney for North Star recently admitted to having seen a set of blades with gradual leading edges in North Star machines, and that he was so apprised prior to the trial in the Akshun case.

On the basis of the independent finding, the photographs of machines sold by North Star with inclined leading edges, and on the basis of the testimony of North Star's attorney, and on the basis of his misleading and totally false arguments before the several courts, the petitioner, Akshun, and its successor V & S Ice Machine Company, Inc., filed a complaint in the United States District Court for the Northern District of Illinois, claiming fraud, and

misrepresentation in obtaining the favorable decision from the Seventh Circuit Court of Appeals and in securing the denial of the Writ of Certiorari in this Court, and asking that evidence be taken thereon.

This independent action, approved as an independent action under Rule 60(b) of the Federal Rules of Civil Procedure was dismissed on the grounds that "plaintiffs must seek leave of the Court of Appeals to proceed in the District Court under Rule 60(b). The Court of Appeals does not grant it such leave and therefore the action must be, and the same is hereby, dismissed." On October 22, 1965, a Notice of Appeal from that Order of Dismissal was filed to the United States Court of Appeals for the Seven Circuit. On the same day, there was lodged in the United States Court of Appeals for the Seventh Circuit, a Motion for Leave to File the Complaint in the United States District Court for the Northern District of Illinois, and to Direct the District Court to take evidence on the fact issues involved and to resolve the same. Notwithstanding that in its collected order of November 5, 1963, in response to the motion filed to vacate the decision the said Court of Appeals said as its reason for rejecting the following:

> "Akshun's petition to vacate judgment pursuant to Rule 60(b) was based principally upon a charge of fraud on the part of plaintiff North Star and on newly discovered evidence.
>
> "On the date of the filing of the Akshun petition to vacate judgent, Rule 60(b), Federal Rules of Civil Procedure, provided in part: 'On motion . . . the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . The motion shall

be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . .'

"The petition of Akshun was not timely as it was filed more than one year after the date of the judgment of this Court." *Order of November 7, 1963, denying "Request For Rehearing on Petition to Vacate Judgment Under Rule 60(b)."*

While there has never been any hearing on the claims of fraud, the Court of Appeals for the Seventh Circuit ruled on the Motion for Leave to File that:

"It appearing that the instant motion attempts to raise once more issues that have been heretofore raised and passed upon by this Court, . . ."

and denied the motion.

On motion of the defendants and the answer of the petitioners thereto the Court of Appeals dismissed the appeal from the dismissal of its original complaint on the ground that:

"It appeared to the Court that the issues raised in this appeal have already been decided by this Court, . . ."

It is the claim of these petitioners that the following acts have been tolerated and condoned in the United States Patent and Judicial systems without a hearing:

1. Piracy of an invention. (*Sucessful*)

2. Fraud upon the Patent Office to obtain a patent upon the stolen invention. (*Unsuccessful*)

3. Fraud upon the District Court in an attempt to invalidate the actual inventor's patent and to have the stolen invention held as not infringing said valid patent. (*Unsuccessful*)

4. Fraud upon a Circuit Court of Appeals to induce it to reverse the *Findings of Fact* of the District Court and the ruling of the Patent Office. (*Successful*)

5. Fraud upon the United States Supreme Court to prevent a review of the Circuit Court's violation of Rule 52(a) and the preservation of a District Court's Findings of Fact. (*Successful*)

6. Fraud a second time upon the Circuit Court to prevent an investigation into documented allegations of Fraud previously practised and newly discovered upon the specific issues by which the Circuit Court reversed the District Court originally. (*Successful*)

7. Fraud a second time upon the Supreme Court to prevent an investigation of the alleged Fraud. (*Successful*)

8. Fraud practised upon the District Court in an original suit seeking to investigate said allegations of Fraud and newly discovered *additional* issues of fraud not previously alleged. (*Successful*)

9. Fraud practiced a third time upon the Circuit Court of Appeals to induce it to prevent an investigation into the newly discovered *additional* issues of fraud. (*Successful*)

In a District Court in another Federal Circuit (5th) there is now pending an attempt to have a newly filed original suit dismissed via a Motion for Summary Judgment contending res judicata of the alleged fraudulent case herein described whereas the issues of said newly filed suit are not the same and a heretofore not litigated patent is involved.

Does the 7th Circuit Court of Appeals have the right to prevent an investigation into *documented issues* of fraud and thereby force multiple litigation upon Petitioner and

the Courts in order to protect Petitioner's valuable patent rights?

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the Orders of the United States Court of Appeals (1) dismissing an appeal from a dismissal of the independent action for fraud because of want of obtaining leave of the United States Court of Appeals to file said independent action and (2) denying leave to file an independent action for fraud, for the following reasons:

I.

This Court should exercise its supervisory power to order the Court of Appeals for the Seventh Circuit to conduct a hearing on charges that the decision of that Court was obtained by wilful and deliberate fraud, misrepresentation, and false evidence.

II.

The refusal of the United States Court of Appeals on the ground of untimeliness, to entertain a motion to vacate, and then to refuse to allow the institution of an independent action and dismissing the appeal from the dismissal of the independent action on the basis of its prior order, but interpreting it as an adjudication of the issues, constitutes a decision of a federal question in a manner in conflict with applicable decisions of this Court, and particular its decision in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238.

III.

When despite a charge of fraud upon the Courts of the United States, the charged litigant is successful in obtaining the fruits of a patent without any hearing on the

validity of the claim that it committed fraud, misrepresentation, and produced false evidence, an exercise of this Court's power of jurisdiction is required to maintain the dignity of the United States Courts and integrity of its decisions.

IV.

Where it is charged that a favorable decision as a result of fraud, misrepresentation, and false evidence and a hearing is denied on that charge allowing the challenged decision to stand, and that is coupled with the doctrine of res judicata to insure future and present favorable decisions in other causes against the Court-declared holder of a valid patent, the United States Court of Appeals has so far departed from the general principles of justice and deprivation of property without due process of law as to call for an exercise of this Court's power of supervision in the maintenance of constitutionally assured rights of property.

Having failed to appropriate the invention in the Patent Office, Respondent, Lyle Branchflower launched a Declaratory Judgment action against the rightful owners of the patent invention and attempted to prove before a Federal District Court that he was the actual inventor. The uncontroverted evidence opposing such ends being so overwhelming, the Respondent abandoned such attempts and then presented a planned presentation of "Proof" that although the patented machine was acknowledged finally to be invented by another, the machines manufactured by Respondent did not infringe the said patent.

The District Court gave full consideration to said arguments and rendered both a finding of infringement and unclean hands decision against the respondent.

Upon appeal before the Seventh Circuit Court of Appeals, Respondent through counsel reiterated in detail the same arguments of non-infringement and prevailed upon the Court of Appeals to make their own determination concerning the factual identity and function of the physical exhibits and gained a reversal of both the unclean hands and infringement finding.

Before the United States Supreme Court, the respondent reiterated in detail its planned and rehearsed scheme in successfully resisting Certiorari.

Subsequently, Petitioner's representatives discovered that all of the exhibits and documents upon which the Court of Appeals reversed the District Court were fraudulent and that the precise structure alleged by respondent as "never having been used" in their machines was in fact the actual structures used. Said facts were detailed in documented and photographed form and made into a Petition under Rule 60(b) and presented before the 7th Circuit Court of Appeals for the purpose of investigating the fraud committed. Said Petition was denied on the sole basis of timeliness.

Petitioner's then became the victim of Summary Judgments being granted against their valuable patent. On the basis of this decision a different defendant has obtained a partial Summary Judgment in another case. *Akshun Manufacturing Company and V & S Ice Machine Company* v. *Carrier Corporation,* 57 C 1065, Northern District of Illinois E.D. In the Eastern District of Texas, a Motion for Summary Judgment based on the judgment these petitioners claim was fraudulently obtained, is pending and to be heard March 11, 1966.

Petitioners in taking the deposition of the attorney of the respondent in the *Carrier* case discovered that he knew

before the trial of this matter that the actual structures used in respondent's machines were unlike the Exhibit upon which the reversing decision of non-infringement was made in the one single physical respect upon which said decision is based.

This, coupled with actual views of the flake ice making machines used by the respondent, North Star Ice Equipment Company, was the basis for an independent action under the savings provisions of Rule 60(b) against said North Star, and against its attorney, its principal owner, and its officers and employees who gave testimony and presented exhibits and made representations that only the straight line, single function Exhibit 21 was the flake ice making blade used in all of the machines manufactured by North Star. On Motion of the Respondents, the independent action was dismissed by the District Court for failure to secure leave of the Court of Appeals to file the independent action.

Subsequently, and in good time, an appeal was taken from the District Court's dismissal of the independent action, and on the same date, leave was sought of the United States Court of Appeals for permission to file in the United States District Court, in the hope that the basis for the dismissal would be obviated without lengthy and expensive litigation. The Motion for Leave to File was filed in the original appeal. On December 7, 1965, the motion for leave to file was denied. On February 2, 1966, on motion of the respondents relying on the single ground that by denying petition for leave to file the original action in the District Court, there had been a decision on the issue raised by the appeal, and the Court of Appeals was urged to dismiss the appeal on its merits. Thus, the United States Court of Appeals for the Seventh Circuit determined that its denial of permission for leave to file

was dispositive of whether an independent suit in the trial court could be filed without securing leave of the Court of Appeals, and opportunity to argue the question posed on appeal, that is whether leave of the Court of Appeals was required to file the independent action, was foreclosed.

We submit that the summary disposition of the appeal without the right to argue the appeal was prejudicial error, and constitutes a case decided in conflict with applicable decisions of this Court and of other Courts of Appeals. This Court has long recognized:

> "The right, by an original bill, to impeach and decree for fraud . . . as existing even after the decree has been affirmed by an Appellate Court." *Kingsbury* v. *Buckner,* 134 U.S. 650, 670.

The Tenth Circuit in *Brady* v. *Beams,* 132 F. 2d 985, said:

> "But it may be assumed without deciding that appellants are correct in their contention that the action is not a bill of review, that instead it is an independent action; and that therefore leave of this court to file it was not requisite. A United States court sitting in equity may vacate and set aside a judgment for fraud which was extrinsic or collateral to the matter tried but not for fraud which was in issue in the former suit." *Brady* v. *Beams,* 10 Cir., 132 F. 2d 985, 986-987.

See also *Pacific Railroad of Missouri* v. *Missouri Pacific Railroad Co.,* 111 U.S. 505; *Nelson* v. *Meehan,* 9 Cir., 155 F. 1, which stand for the proposition that in cases of fraud practiced upon the District Court, that Court need not first seek leave of the Court of Appeals even where the latter's mandate has come down.

By its summary dismissal of the appeal on the basis that it had denied leave to file, the United States Court of

Appeals for the Seventh Circuit has foreclosed to these petitioners a justicible controversy given by their statutory right to appeal, and which right is only foreclosed when the appeal is patently and undeniably vexatious or frivolous.

If the orders of the United States Court of Appeals for the Seventh Circuit are allowed to stand, the result and prejudice to these petitioners is a de facto deprivation of their patent, declared legally valid and a subsisting judgment that the respondent, North Star's manufactured blade does not infringe the petitioner's valid patent, though the petitioners contend that the blade upon which the determination was made is not the blade manufactured by North Star and sold to customers, that it is in fact a fake and a fraud. The harm caused to the Courts is an impairment of their dignity, and of the integrity of their judgments. We submit that this is contrary to applicable decisions of this Court and in conflict with decisions of other Circuits.

In the leading case of *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238, the Supreme Court recognized the inherent power of courts, wherein a fraud is perpetrated, to impeach any judgment so obtained and to relieve the parties prejudiced. There the fraud was principally one on the Court of Appeals for the Third Circuit and that Court assumed jurisdiction. The Supreme Court held:

> "Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment. And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of

the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away. Every element of the fraud here, disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.

* * *

"This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. The *Mercoid Corporation* v. *Mid-Continent Investment Company,* 320 U.S. 661, 64 S. Ct. 268; *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U.S. 488, 62 S. Ct. 402, 86 L.Ed. 363. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistenly with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U.S. 238, 245, 246.

The Third Circuit in *Root Refining Co.* v. *Universal Oil Products,* 169 F. 2d 514 *held similarly*:

"This argument completely ignores the inherent power of a court to inquire into the integrity of its own judgments. Such a judgment implies the prior existence of a justiciable case or controversy between opposing litigants; but when the controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their

judgments after the term at which they were rendered has no application. The matter is not one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that it becomes immaterial that the injured party may have been derelict in bringing the fault to the court's attention.

• • •

"The power inheres in the appellate as well as in the trial court and the former may vacate its own judgment and direct the vacation of a decree of the latter entered pursuant to the mandate of the former." *Root Refining Co.* v. *Universal Oil Products Co.*, 3 Cir., 169 F. 2d 514, 521, 522.

The Eighth Circuit in *Assman* v. *Fleming*, 159 F. 2d 332 recognized that "Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case." 159 F. 2d at 336.

These petitioners have made serious charges of fraud, misrepresentation, and false evidence to be attributed to a party litigant, its officers, owners, and employees, and its attorney, an officer of this and inferior United States Courts.

Petitioner has diligently pursued its proper legal remedies for the sole purpose of obtaining a hearing on these serious charges.

Respondent has equally diligently resisted an investigation having obtained a favorable reversing Circuit Court decision on the specific issues upon which the charge of Fraud was made.

It is not reasonable to believe that Petitioners would embark upon expensive and lengthly litigation in multiple Federal Circuits if they had anything of an unfactual

nature concerning the alleged fraud upon which only a hearing is sought. It is likewise not reasonable to believe that Respondents would not welcome an open District Court hearing to make a final disposition of these charges against them.

Already vastly more sums have been expended by both parties with the sole result to date of prevention of a hearing then if a full District Court hearing had been held to determine said issues openly and fairly.

Respondent is now asserting in the Courts below that the ruling of the Seventh Circuit against Petitioner's original Petition under 60(b) on the sole basis of "timeliness" was a ruling on the "merits" of the allegations of Fraud whereas no such determination was made or could be made at the Seventh Circuit Court of Appeals level.

Now before the District Court in Tyler, Texas is an original suit which involves the use of the patented blades in ice machines manufactured by Respondent. Said blades are the actual ice removal blades as manufactured by Respondent and are of the physical structure precisely different from the trial ice removal blade Exhibit (Exhibit 21) in the one respect upon which the Seventh Circuit Court of Appeals reversed the District Court finding of infringement in the trial in Chicago of 1960 concerning the structure and function of the "North Star ice removal blades", and the Respondents here have intervened and asserted disposition of the issues the judgment claimed fraudulent by these Petitioners.

Although the new suit now in Federal District Court in Tyler, Texas contains issues different from those previously involved in the 1960 Chicago litigation in addition to the fact that the ice removal blades of the new suit are structurally different from the North Star "Exhibit

21" blade, a granting of certiorari and direct hearing on these grevious charges, would greatly relieve the difficulties on both litigants and the Courts in future protracted litigation.

The Supreme Court should take this case if for no other reason than to impose absolute honesty in all pleadings before the Supreme Court. Fraud cannot be condoned or even suspect upon the Courts of the United States.

By granting Certiorari the Supreme Court will be upholding its great tradition of upholding the auspices of the Federal Judicial System and its integrity.

By denying Certiorari the Supreme Court would not be denying the merits of the allegations of fraud, since this Petition seeks only an investigation of said allegations, but rather it would be denying the right and indeed the obligation of the Judiciary to investigate a fraud upon the court, and in this case compound frauds upon all levels of the Courts and the Patent Office.

CONCLUSION

Wherefore, these petitioners pray this Court issue its Writ of Certiorari to review the orders of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

ANNA R. LAVIN,
EDWARD J. CALIHAN, JR.,
PETER R. SCALISE
Attorneys for Petitioners

APPENDIX

ORDER OF DECEMBER 7, 1965

This was a suit asking this Court to declare United States Patent No. 2,659,212 invalid and not infringed by North Star's ice removal tool, method of removing ice and the ice machine combination.

On March 20, 1962, this Court entered a decision and judgment in this case affirming in part and reversing in part the judgment of the District Court. We reversed that part of the District Court's judgment which held that Claims 1 through 8 of the patent in suit were infringed by North Star knives and tools. We also reversed the holding of the District Court that plaintiff came into court with unclean hands.

On May 17, 1963, about fourteen months after the date of our judgment, defendant Akshun filed in this Court a petition under Rule 60 (b) asking that we vacate our judgment dated March 20, 1962 or, in the alternative, for leave to move before the District Court that the judgment be vacated under Rule 60 (b) or to remand to the District Court the issues raised by said petition.

Akshun's petition to vacate our judgment was based partly upon a charge of fraud on the part of North Star and on alleged newly discovered evidence.

On June 13, 1963, Akshun filed what it designated as an "Emergency Motion" asking leave to file an answer to the answer of North Star. We denied this motion by our order dated July 30, 1963. We also denied the petition filed by Akshun that our judgment dated March 20, 1962, be vacated and for alternative relief.

By order dated November 5, 1963, this Court determined the petition by Akshun was not timely filed and we denied the petition of Akshun to vacate our judgment; we also denied the request for a rehearing on the petition to vacate.

On October 22, 1965, there was lodged with the Clerk of this Court, a motion for leave to file a complaint in the United States District Court for the Northern District of Illinois. Again, the claim was made of fraud alleged to have been committed by plaintiff, North Star, its attorney and its representatives. The motion specifically asked leave to refile the complaint which was attached, and to direct the District Court to take evidence on the fact issues involved and to resolve same.

It appearing that the instant motion attempts to raise once more issues that have been heretofore raised and passed on by this Court,

It Is Ordered, the motion of Akshun Manufacturing Company and V&S Ice Machine Company, Inc., for leave to file a complaint in the United States District Court for the Northern District of Illinois, Eastern District, be and the same is hereby Denied.

ORDER OF FEBRUARY 2, 1966

North Star Ice Equipment Company, et al., defendants-appellees, having filed their motion to dismiss this appeal and the Ashkun Manufacturing Company and V & S Ice Machine Company, Inc., plaintiffs-appellants, having filed their answers to said motion, and it appearing to the court that the issues raised in this appeal have already been decided by this court,

It is ordered that the motion to dismiss the appeal be and the same is hereby granted. Appeal dismissed.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 3 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1100

AKSHUN MANUFACTURING COMPANY AND V & S ICE MACHINE COMPANY, INC.,

Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Respondent,

AND

NORTH STAR ICE EQUIPMENT COMPANY; JAMES C. WOOD; LYLE BRANCHFLOWER; ALLEN J. TREUER; AND LOREN HOVLAND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM J. STELLMAN,
LLOYD W. MASON,
20 North Wacker Drive,
Chicago, Illinois 60606,
Counsel for Respondents.

HOFGREN, WEGNER, ALLEN,
STELLMAN & MCCORD,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1100.

AKSHUN MANUFACTURING COMPANY AND V & S ICE MACHINE COMPANY, INC.,

Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Respondent,

AND

NORTH STAR ICE EQUIPMENT COMPANY; JAMES C. WOOD; LYLE BRANCHFLOWER; ALLEN J. TREUER; AND LOREN HOVLAND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition filed herein raises the same matters raised in the Petition for a Writ of Certiorari filed February 3, 1964, in this Court in No. 805. That Petition was denied on March 23, 1964.

JURISDICTION.

The jurisdictional requisites are adequately presented in the Petition.

STATEMENT OF THE CASE.

Petitioners are the patent owner. The patent has been declared valid but not infringed by Respondent, North Star Ice Equipment Company.

In March, 1957, Petitioner filed a patent infringement suit against a customer of North Star Ice Equipment Company in the state of Wisconsin.

In July, 1957, Respondent, North Star, filed a Declaratory Judgment action in the Chicago District Court against Petitioner, Akshun, and its licensee.

On April 25, 1961, the District Court held the patent valid and infringed.

On March 20, 1962, in Appeal No. 13443, the Court of Appeals for the Seventh Circuit reversed the District Court as to infringement, holding that the patent was not infringed, and further that the Petitioners were estopped to interpret their claims more broadly so as to include the North Star structure, a typical file wrapper estoppel matter.

In August, 1962, a Petition for a Writ of Certiorari was filed in this Court, No. 343, and Certiorari was denied, Nov. 5. 1962, 371 U. S. 889.

On May 17, 1963, Petitioners filed a Petition under Rule 60 (b) F. R. C. P. in the Court of Appeals for the Seventh Circuit asking alternatively:

(a) "to vacate judgment under Rule 60 (b)"

(b) "for leave to move before the District Court that the judgment be vacated under Rule 60(b)" or

(c) "to remand to the District Court the issues raised by this Petition."

On May 21, 1963, the Court of Appeals ordered North Star to Answer or respond to the Petition within 20 days. (Appendix A herein)

On June 10, 1963, North Star answered the Petition, fully and completely documenting all of the structures made by North Star and showing that the Petition was, in fact, baseless.

On July 30, 1963, the Court of Appeals dismissed the Petition on its merits and denied the alternative relief requested (Appendix B herein), saying:

> "The Court being fully advised of the issues raised by the Petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company
>
> * * * * *
>
> IT IS FURTHER ORDERED, that the Petition filed by Akshun Manufacturing Company, that our judgment herein dated March 20, 1962, be vacated, and for alternative relief, be and the same is hereby denied."

In August, 1963, a request for rehearing on the Petition to Vacate Judgment under Rule 60 (b) was lodged with the Clerk of the Court of Appeals for the Seventh Circuit.

On November 5, 1963, the Court of Appeals denied the request for rehearing, stating therein as a further ground for denial, that the Petition was not timely.

On February 3, 1964, a Petition for a Writ of Certiorari to the Court was filed (No. 805) and denied by this Court on March 23, 1964, 376 U. S. 952.

On July 21, 1965, Petitioners filed an independent action in the Chicago District Court, No. 65 C 1219, making the

same allegations as were raised in the Petition under Rule 60 (b) in 1963.

On September 30, 1965, the District Court, pursuant to Motion and briefs filed in support, dismissed the suit on the ground that the Court of Appeals had denied Petitioners leave to proceed in the District Court on July 30, 1963.

On October 22, 1965, Notice of Appeal from the dismissal was filed, eventually becoming Appeal No. 15461 in the Court of Appeals for the Seventh Circuit.

On November 1, 1965, Petitioners filed a request before the Court of Appeals for the Seventh Circuit for leave to file the Complaint that had been dismissed by the District Court in No. 65 C 1219. This request was filed in original Appeal No. 13443.

On December 7, 1965, the Court of Appeals denied leave to file a Complaint in the District Court on the ground that Petitioners were seeking the same relief requested in 1963 and the motion only raised issues previously passed upon by the Court.

On February 2, 1966, pursuant to Motion by Respondent, North Star, Appeal No. 15461 was dismissed by the Court of Appeals on the ground that the issues in the appeal had already been decided by that Court.

Now Petitioners have filed the instant Petition for a Writ of Certiorari in No. 1100 seeking to review both appeals in the Court of Appeals for the Seventh Circuit, Nos. 13443 and 15461.

JUDGMENT AND ORDERS OF THE COURT BELOW.

Petitioners have placed the above heading in their Petition contending that they have been denied a hearing on the merits. Petitioners have had the full attention of the Court of Appeals on the merits of their Petition, and the Court found the alleged merits to be lacking.

Petitioners have omitted reference to the Order of the Court of Appeals for the Seventh Circuit dated May 21, 1963, ordering Respondent, North Star, to answer the Petition filed on May 17, 1963.

Petitioners have also omitted reference to the Order of the Court of Appeals dated July 30, 1963, denying the Petition and the alternative relief prayed for on the ground that the Petition lacked merit. Both of these Orders are appended hereto in the Appendix.

QUESTIONS PRESENTED.

All four questions are based on an erroneous premise that Petitioners have been denied a hearing on the merits of their charges. The Court of Appeals carefully considered the charges of fraud and misrepresentation in 1963.

On May 17, 1963, the same charges raised now were presented by Motion under F. R. C. P. Rule 60 (b) before the Court of Appeals for the Seventh Circuit. Respondent answered those charges on June 10, 1963, as ordered by the Court of Appeals for the Seventh Circuit on May 21, 1963. The answer was full and complete, showing conclusively there was no merit to Petitioners' charges. Physical ice removal blades complained of were placed before the Court of Appeals and fully documented.

On July 30, 1963, the Court of Appeals denied the Petition on its merits.

Petitioners have had the hearing to which Questions 1 and 2 are directed.

On November 5, 1963, the Court of Appeals for the Seventh Circuit denied a Petition for Rehearing of the July 30, 1963 Order. In this November Order, the Court of Appeals for the Seventh Circuit mentioned an additional reason for denying the original Petition under Rule 60 (b), that of timeliness. Petitioners herein choose to ignore the Order of July 30, 1963, denying the merits of their charges in favor of the November 5, 1963 Order.

The dismissal of the independent action brought in the District Court (Civil Action No. 65 C 1219) and the dismissal of the Appeal (No. 15461) was proper because the merits of the Complaint has been decided by the Court of Appeals by its July 30, 1963 Order.

The Order of December 7, 1965, by the Court of Appeals in No. 13443, denying leave to these Petitioners to file the independent action, was also proper. The same leave was requested in the May 17, 1963 Petition before the Court of Appeals and denied by its Order of July 30, 1963.

These Petitioners raise no new issue nor present any new evidence over that presented to the Court of Appeals for the Seventh Circuit in the Petition filed May 17, 1963, and in the Petition for a Writ of Certiorari in No. 805 during the October Term, 1963.

The Court of Appeals examined the charges made and denied the Petition on its lack of merit.

Petitioners' charges have been thoroughly reviewed by the Court of Appeals for the Seventh Circuit. Petitioners have had their day in Court and their charges have been found baseless. Petitioners have used the judicial processes to seek a second review of the same charges before the Court of Appeals. They were unsuccessful. Now, Petitioners seek to use judicial processes to seek a second

review before this Court. They should be unsuccessful and Certiorari denied.

There should be an end to litigation.

CONCLUSION.

The Court of Appeals for the Seventh Circuit has carefully considered the charges of fraud and misrepresentation brought by these Petitioners. The Court of Appeals has denied the charges on their lack of merit. The Supreme Court has previously denied a Petition for a Writ of Certiorari. There is no substance to the charges and there is no reason which should compel this Court now to grant a Writ of Certiorari. This Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. STELLMAN,
LLOYD W. MASON,
Counsel for Respondents.

HOFGREN, WEGNER, ALLEN,
STELLMAN & MCCORD,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Respondents.

April 29, 1966.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Tuesday, May 21, 1963.

Before
Hon. F. Ryan Duffy, Circuit Judge.

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant (Respondent),
No. 13443 *vs.*
AKSHUN MANUFACTURING COMPANY, ET AL.,
Defendants-Appellees (Petitioners).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that North Star Ice Equipment Company file an answer or otherwise reply to the petition of Akshun Manufacturing Company and V&S Machine Company, Inc to Vacate Judgment Under Rule 60(b), Or For Leave To Move Before The District Court That The Judgment Be Vacated Under Rule 60(b), Or To Remand To The District Court The Issues Raised By This Petition, filed in this Court on May 17, 1963, within twenty (20) days from this date.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

July 30, 1963.

Before

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant,
No. 13443 *vs.*
AKSHUN MANUFACTURING COMPANY, ET AL.,
Defendant-Appellees.

On March 20, 1962, this Court rendered a decision and judgment, affirming in part and reversing in part, the judgment of the District Court herein. We reversed that part of the District Court judgment which held that claims 1 through 8 of the patent in suit were infringed by North Star knives and tools. We also reversed the holding of the District Court that plaintiff came into Court with unclean hands.

Approximately fourteen months later, to-wit, on May 17, 1963, defendant Akshun Manufacturing Company filed with the Clerk of this Court, a petition to vacate our final judgment, or for leave to move before the District Court that the judgment be vacated under Rule 60(b), or to re-

mand to the District Court the issues raised by the petition. On June 10, 1963, plaintiff North Star Ice Equipment Company filed its answer to the petition, denying the pertinent allegations of the petition.

On June 13, 1963, Akshun Manufacturing Company filed what it designated as an "Emergency Motion", asking leave to file an answer to North Star's answer.

The Court being fully advised of the issues raised by the petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company

IT IS ORDERED, the petition of Akshun Manufacturing Company for leave to file an answer to the answer filed by North Star Ice Equipment Company be and the same is hereby denied.

IT IS FURTHER ORDERED, that the petition filed by Akshun Manufacturing Company, that our judgment herein dated March 20, 1962 be vacated, and for alternative relief, be and the same is hereby denied.